

Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

January 12, 1987

The Honorable Charles R. Hastings
Yavapai County Attorney
Yavapai County Courthouse
Prescott, Arizona 86301

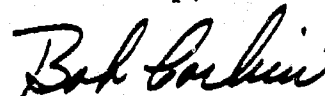
Re: I87-006 (R86-163)

Dear Mr. Hastings:

Pursuant to A.R.S. § 15-253(B), we decline to review the opinions expressed in your November 12, 1986 letter to Dr. Glenn Treadaway, Principal of Prescott High School regarding the question whether a particular religious youth group may form a chapter on the Prescott High School campus.

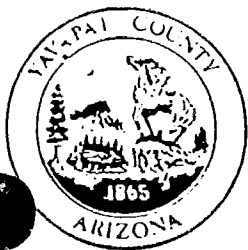
We observe that you have correctly noted that since issuance of Ariz. Atty. Gen. Op. 74-34-C, Congress in 1984, enacted the Equal Access Act, 20 U.S.C. §§ 4071 to -4074, which provides that it is unlawful for public secondary schools that receive financial assistance from the federal government to deny equal access to a limited open forum, as defined in the Act, to students on the basis of religious, political, philosophical or other content of speech.

Sincerely,



BOB CORBIN
Attorney General

BC:TLM:pnw



Yavapai County Attorney

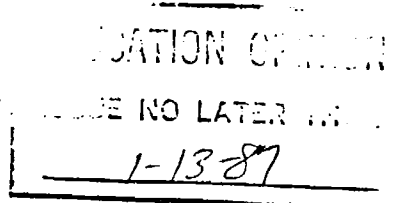
YAVAPAI COUNTY COURTHOUSE
PRESCOTT, ARIZONA 86301
(602) 445-7450

CHARLES R. HASTINGS
YAVAPAI COUNTY ATTORNEY

November 12, 1986

886 - 103

Mr. Glenn Treadaway, Principal
Prescott High School
c/o Prescott Unif. School Dist. #1
146 South Granite Street
Prescott, Arizona 86301



Dear Mr. Treadaway:

You have requested a legal opinion from this office pertaining to the legality of permitting the formation of a chapter of an organization known as "Youth Alive" on the Prescott High School campus. It is my understanding that among the stated purposes of this group is the promotion of Christianity and its ideals. The statement of purpose which you have provided me further indicates that: "The group will be under the supervision of an Assemblies of God adult advisor. Student leader(s) will be appointed by the advisor." There is another provision that the chapter will charter annually with the national Youth Department of the Assemblies of God. And in the proposed constitution, Article VI provides that the Youth Alive Club shall be under the guidance of the faculty advisor.

Prior to 1984 your inquiry would have been much easier to answer, and the answer would surely have been negative. Arizona Attorney General Opinion No. 74-34-C and a series of other authorities made it clear that the utilization of school property for religious clubs was impermissible.

This area of the law is presently in considerable flux. In 1984 the Equal Access Act, Pub.L. No. 98-377 §801 et seq., 20 U.S.C. §4071 et seq., was passed in an attempt to afford equal protection to students belonging to religious and other groups in their exercise of constitutional rights of free speech and assembly. The Act in the short term has added a measure of confusion to the issue of the proper, legal, constitutional relationship between school districts and religious organizations, although the Act's purpose was to relieve some of that confusion. The confusion will not be fully relieved absent further judicial action, particularly by the Supreme Court. In the meantime, it must be presumed that the Act is constitutional. 1/ If the Act is not followed, the

1/ See, New York v. O'Neill, 359 U.S. 1, 6, 79 S.Ct. 564, 568, 3 L.Ed.2d 585 (1959)

November 12, 1986

District could be held liable in a civil rights lawsuit for depriving students of their constitutional rights of free speech and assembly; which is not to say that the District would not be sued if it does abide by the terms of the Act. A lawsuit could be filed by or on behalf of other students pursuant to the Establishment Clause.

Undoubtedly the Equal Access Act will be given refinement in future case law and regulation. In the meantime, the statute itself requires that public secondary schools which receive federal aid and have a "limited open forum" provide "fair opportunity" for voluntary student political or religious groups to meet at school during "noninstructional time" on the same basis as other extracurricular groups. A copy of the Equal Access Act is attached.

It is apparent that Prescott High School is a secondary school. The Act defines a secondary school as a public school which provides secondary education as determined by State law. I assume also that Prescott High School receives some federal assistance.

I am not certain whether Prescott High School has a "limited open forum." The statute indicates that a school has a limited open forum whenever it grants an opportunity for at least one "noncurriculum related" student group to meet on school premises during "noninstructional time."

The Act does not define "noncurriculum related," and this is, therefore, subject to interpretation. In the definition of the term "meeting" reference is made to activities "not directly related to the school curriculum."^{2/} As a result of House debate on the matter, it has been suggested that there can be formulated a two-part test whether an activity is noncurriculum related: 1) Are a group's activities of a type that a public school can legally sponsor? and 2) Does the school require or directly encourage student participation in the activity in connection with schoolwork?^{3/} If as to all groups on campus the answers are both in the affirmative, then the Act does not apply because the school does not maintain a limited open forum; e.g., if all the groups were of a curriculum-related type such as music clubs, photo clubs, language clubs. On the other hand, if the answer to either question is no, then the Act is triggered; the school does have a limited open forum. Even if only one group with only a few members fails to meet the curriculum-

2/ See Sec. 803(3)

3/ See 130 Congressional Record H7732

November 12, 1986

relatedness test and is allowed access to school facilities, the school is deemed by the Act to have a limited open forum and must allow political or religious groups equal access during noninstructional time.

"Noninstructional time" is defined by Section 803(4) to mean time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. It might be argued that this does not include the lunchtime hour; however, this is a rather weak argument outside the spirit of the Equal Access Act, since in actual practice this is a time set aside for activities rather than instruction.

Neither Prescott High School nor any other secondary school is required to offer a limited open forum. However, many high schools have historically operated what is now called a limited open forum out of a desire to offer a broad educational experience and variety of activities for their students. If a high school decides to operate a limited open forum, the Act requires it to provide a fair opportunity for students to conduct a meeting without regard to the content of speech of such meeting. A policy should be adopted by the District, if it has not yet done so, pursuant to the Act and its guidelines, which will apply uniformly and ensure the neutrality of the school while also maintaining proper order.

A school is deemed to offer a "fair opportunity" and, thus, comply with the Act if the school uniformly provides that:

- a) There is no sponsorship of the meeting by district personnel. Sponsorship means act of promoting, leading or participating in a meeting.
- b) The meeting is voluntary and student initiated, e.g., not initiated by a parent, teacher, etc.
- c) Nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.
- d) The meeting does not materially and substantially interfere with the orderly conduct of educational activities; and is not for unlawful purposes.

It is advisable that the policy include also:

- e) That any district employee be present for

November 12, 1986

custodial, nonparticipatory purposes only, to ensure student safety and protect district property.

- f) That nonschool personnel be prohibited at meetings of groups during noninstructional time on school grounds. This would avoid problems in determining when an outsider is directing the meeting without the district risking excessive entanglement between religious organizations and a governmental entity.
- g) School personnel should not be compelled to attend any meeting, the content of which would be contrary to the employee's beliefs.
- h) There is no encouragement by district personnel for such organization; nor any expenditure of public funds for such group beyond providing the space for meetings, e.g., supplies or materials are not to be provided the group by the district.
- i) The policy should apply to all groups, regardless of size, though the Act §802(d)(6) may allow such limitation. The policy may place uniform restrictions on the time, place, manner in which groups may meet so long as there is uniform, neutral application to all.

If the district does not wish to fall under the parameters of the Act, there are several actions which it could take. It could eliminate the practice of providing a time for extracurricular activities; it could limit permissible activities to those which are curriculum-related; it could integrate activities into instructional periods to the extent possible and prohibit an open forum if not possible.

The risk of noncompliance does not include the denial or withholding of federal funds for the district or school.^{4/} Rather, enforcement would likely be in the form of a lawsuit seeking an injunction or monetary damages for infringement of constitutional rights.

4/ See Sec. 802(e)

November 12, 1986

Applying the Act to the proposed Youth Alive group, under the assumption that Prescott High School maintains a limited open forum, there are several areas of concern (I assume for this opinion that the organization was initiated by one or more students). First, the statement of purpose indicates the supervision by an Assemblies of God adult advisor and appointment of student leaders by that advisor. The organization may not have brought itself under the protection of the Act by inclusion of this statement of purpose. The purpose of the Act is to protect student rights of speech and association. The appointment of student leaders by nonschool persons and the placement of the group under the supervision of nonstudent, nonschool persons is violative of the spirit of the Act and need not be permitted under Section 802(c)(5) of the Act. While the school cannot limit the association of group members with nonschool persons off school grounds during noninstructional time, it does not deny equal access if it prohibits meetings directed, conducted, controlled or regularly attended by non-school personnel during noninstructional activity periods on campus.

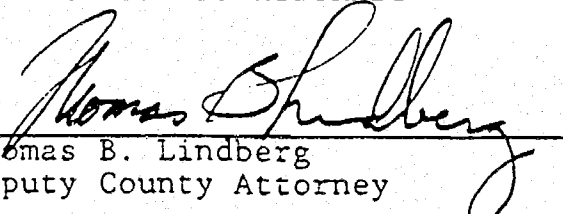
My second concern is the statement in Article VI of the proposed constitution of this organization that the club shall be under the guidance of the faculty advisor. This provision would, in my opinion, have the effect of excessive entanglement between a governmental entity and religion. The policy of the school should be in accordance with Section 802(c)(2) and (3) and 803(2) of the Act so as to prohibit any act of promoting, leading or participating in a meeting by district personnel. Both of these concerns can be overcome, obviously, by amendment of the constitution and by-laws and compliance with the policies set out in the Equal Access Act, Section 802(c).

I hope this letter addresses your concerns. If you have further questions, please call me.

A copy of this opinion will be forwarded to the Arizona Attorney General's Office for review.

Sincerely,

CHARLES R. HASTINGS
YAVAPAI COUNTY ATTORNEY

By 
Thomas B. Lindberg
Deputy County Attorney

TBL:ces

ccs: ✓ Arizona Attorney General
Dr. James Howard, PUSD #1
Dr. Eugene Hunt, YC School Supt.
Encls.(2)

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